

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 CASE NO. 08-01789-smb

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5 SECURITIES INVESTOR PROTECTION

6 CORPORATION

7 v.

8 BERNARD L. MADOFF INVESTMENT

9 SECURITIES, LLC, et al,

10 Debtors.

11 - - - - - x

12 U.S. Bankruptcy Court

13 One Bowling Green

14 New York, New York

15

16 MARCH 4, 2014

17 2:00 PM

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21 B E F O R E :

22 HON. STUART M. BERNSTEIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: MATTHEW

1 HEARING Matter: OSC - hearing to discuss certain pending  
2 motions to dismiss and mediation

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P R O C E E D I N G S

THE CLERK: -- reason for this hearing, at the February 14th hearing, some parties expressed a concern about Ms. Chatman's (ph) pending omnibus motion to dismiss and their desire to be heard on some of these issues, and at some point as I recall, the trustee proposed to file an omnibus reply to all pending motions to dismiss, and subsequently filed a schedule identifying 146 motions.

I subsequently received letters from Lashann DeArcy at Morrison Foerster which had filed five motions to dismiss in October 2011 and raised at least two issues in my mind, it appears that the consideration of these pending motions to dismiss was inconsistent with the litigation management order which was entered earlier in the case by Judge Lifland, and in particular, required mediation before the trustee filed a response.

In addition, the Morrison & Foerster clients simply didn't want to participate in a motion to dismiss, they believed that the motions had been decided by Judge Rakoff, these motions had been made early, and wanted to proceed immediately with mediation. So I issued an order scheduling this hearing to consider the status of the mediation requirement that might have -- the procedure that I adopted, which permitted the trustee to file omnibus motions to all these pending motions, omnibus objections to



1 all these pending motions to dismiss, and to determine  
2 whether anybody wanted to opt out of the procedure, for  
3 whatever reason, to save money, if they didn't think it was  
4 worth their time and effort to then have to file a reply,  
5 and proceed immediately to mediation. There were also some  
6 other issues which I'll get to later.

7 But that's where we are. Do you want to be heard?

8 MS. DEARCY: Yes, Your Honor. I had intended on  
9 giving you a summary, but I appreciate you --

10 THE COURT: Do you think I left anything out, or  
11 do you think -- you know, this is your chance.

12 MS. DEARCY: No. I represent the Levy, Persky and  
13 Borkowitz families in five separate avoidance actions that  
14 have been brought by the trustee.

15 You are absolutely correct, Your Honor, that  
16 pursuant to the avoidance procedures that were established  
17 prior to the cases being filed against my clients in this  
18 case, automatic mediation was expected for any case where  
19 the amounted issue was less than \$20 million. And I assure  
20 you, sir, that is the case in our clients' adversary  
21 proceedings.

22 Upon our filing of the motion to dismiss, the  
23 trustee was obligated to file a notice of mediation which  
24 would have triggered the process of mediation. That didn't  
25 happen.

1 After some time, and given the fact that we were  
2 keenly aware that a number of cases were pending before  
3 Judge Rakoff that would certainly impact the legal landscape  
4 of the cases that we were going to mediate.

5 We agreed with the trustee that we would wait  
6 until the outcome of the cases before Rakoff, before  
7 proceeding with mediation. And I spoke directly with one of  
8 Mr. Sheehan's colleagues, a Hakthmeth Varell (ph) who I  
9 believe works out of their Ohio office.

10 All of the issues that were raised in our motions  
11 to dismiss were virtually the same, so to the extent that  
12 that applied to any of the cases pending, it applied to all  
13 of them.

14 Your Honor, we represent individuals here, right.  
15 These are people who need certainty in their lives --

16 THE COURT: Uh-huh.

17 MS. DEARCY: -- their lives are on hold pending  
18 the outcome of these cases. The trustee's absolutely  
19 correct, the legal landscape has been set. I would submit  
20 respectfully, Your Honor, that because the legal landscape  
21 has been set, this case is ripe for mediation.

22 I believe that if we all got in a room knowing  
23 what we know, that we could resolve this case without  
24 further briefing, and give my clients the certainty that  
25 they've been waiting over two years at least since the

1 motion to dismiss, and even longer if you count the time the  
2 case has been -- was filed.

3 MR. CREMONA: Good afternoon, Your Honor, Nicholas  
4 Cremona of Baker Hostetler appearing on behalf of the  
5 trustee.

6 If I might, Your Honor, I'd just like to give a  
7 little bit of background before addressing my colleague, Ms.  
8 DeArcy's presentation. We presently have about 150 motions  
9 to dismiss that are on file, and as Your Honor can see from  
10 the schedules we've provided, they've been filed from the  
11 inception of the case, early 2011 through -- even through  
12 yesterday.

13 At the same time in early 2011, we had the process  
14 of defendants moving to withdraw the reference en mass, and  
15 we had an excursion to the district court that lasted about  
16 two and a half years. And a number of issues were raised  
17 and Judge Rakoff withdrew a number of discreet issues that  
18 impacted the innocent investor, cases that are now before  
19 Your Honor.

20 The last issue that was relevant to the good faith  
21 cases was determined by Judge Rakoff's antecedent debt  
22 decision on October 15th of last year, and we commonly refer  
23 to that, that is the decision whereby -- wherein Judge  
24 Rakoff found that the defendants' various claims for damages  
25 and rescission under federal and state law do not constitute

1 value or antecedent debt within the meaning of Section  
2 548(c) of the Bankruptcy Code.

3 It was everyone's understanding that we would be  
4 holding those motions to dismiss in abeyance pending the  
5 resolution of the issues before the district court as I  
6 think Ms. DeArcy just articulated. That occurred October  
7 15th.

8 At that point in time, we had about seven -- about  
9 80 motions to dismiss that were pending. And it was the  
10 view -- the trustee's view at the time that many of those  
11 motions, if not substantially all of them had effectively  
12 been determined by intervening decisions of Judge Lifland  
13 and/or Judge Rakoff, again as I think Ms. DeArcy would agree  
14 with.

15 At that point in time, or shortly thereafter on  
16 November 1, we had the omnibus motion to dismiss filed by  
17 Ms. Chatman's firm, the Becker and Polikoff (ph) motion  
18 which is presently fully briefed and scheduled to be argued  
19 on March 10th.

20 That motion -- the trustee's rationale in dealing  
21 with the motions to dismiss, and whether to go to mediation,  
22 was informed by the direction of Judge Lifland. At the  
23 time, the Judge directed the parties to dispense with  
24 mediation and to move forward immediately on briefing. That  
25 motion -- that omnibus motion to dismiss.

1           So although we had gotten the clarity we wanted on  
2           October 15th that allowed us to now move forward with the  
3           over 600 cases that had now been sent back before Your  
4           Honor, we were informed that we should dispense with  
5           mediation and go forward on certain of those motions to  
6           dismiss.

7           So given that back drop, we felt that -- and given  
8           the rulings that Your Honor made on February 14th indicating  
9           that to the extent motions to dismiss raise the same issues  
10          based on the same predicate facts, the rulings would be  
11          dispositive of other similar motions.

12          THE COURT: Well, that's sort of what I said, but  
13          look, the question really is, if somebody doesn't want to go  
14          forward with this, because they don't want to spend the time  
15          and money, why should they have to?

16          MR. CREMONA: We don't disagree with that, Your  
17          Honor. We think that -- we would -- well, based on what --  
18          I think one simple solution to what Ms. DeArcy said is that  
19          her motion has been determined, the issues in her motion  
20          have been determined by the decisions of the district court  
21          and/or Judge Lifland. If that's the case, we would suggest  
22          that the motion to dismiss be withdrawn, and we'd be happy  
23          to go forward --

24          THE COURT: Do you have any objection to  
25          withdrawing the motion to dismiss?

1 MS. DEARCY: I'm sorry. Yes, Your Honor. I  
2 believe that the adversary procedures contemplated allowing  
3 us an opportunity to mediate and see if we could come to a  
4 resolution without waiving our ability --

5 THE COURT: Well, you could withdraw without  
6 prejudice, because you made your motion very early, it's one  
7 of the issues I want to raise with you --

8 MS. DEARCY: Yes.

9 THE COURT: -- later, but you made the motion very  
10 early.

11 MS. DEARCY: Yes.

12 THE COURT: You'd have to make a different motion  
13 to dismiss at this point, wouldn't you?

14 MS. DEARCY: Sort of. I mean, if withdrawal of  
15 this motion would be without prejudice to our ability to  
16 file another motion to dismiss --

17 THE COURT: Any objection to that?

18 MR. CREMONA: None whatsoever.

19 THE COURT: Okay. So why don't you just file a  
20 notice so we have it on file withdrawing it without  
21 prejudice your motions to dismiss.

22 MS. DEARCY: And the trustee would then proceed  
23 with filing mediation?

24 THE COURT: And I'll direct immediate mediation in  
25 these matters, and I don't know if there's anybody else who

1 wants to go through this -- who doesn't want to participate  
2 in this procedure under the same terms. And particularly,  
3 you do have a lot of these older motions, I know it's not  
4 your issue, but --

5 MR. CREMONA: Your Honor, we would be happy to  
6 entertain a procedure whereby we could allow parties to  
7 agree to withdraw the motions as moot because we --

8 THE COURT: Well, why don't you contact them? You  
9 know, I don't know if this is the right place to ask for a  
10 vote of anybody, but.

11 MR. CREMONA: We haven't -- we absolutely will do  
12 that, Your Honor. That was sort of contemplated. We  
13 intended to do that. We -- if there was an intervening  
14 event as they described, the motion that was filed and 128  
15 actions and we did get some direction from Judge Lifland at  
16 the time which informed our decision as to how to proceed --

17 THE COURT: Uh-huh.

18 MR. CREMONA: -- but at this point in time, we'd  
19 be happy to do that. It was just that given the rulings  
20 that we thought occurred on 2/14 and the rights that -- of  
21 parties that were implicated, we wanted to provide the  
22 widest opportunity and notice for people to have an  
23 opportunity --

24 THE COURT: I didn't say that. And the provenance  
25 of this was and I think Ms. Neville is on the phone --

1 MS. NEVILLE: Yes.

2 THE COURT: -- she's arguing for the right to be  
3 heard, which I understood, and then the trustee stood up,  
4 and said, fine, I'll file an omnibus reply to all of the  
5 pending motions. But, you know, frankly I was not familiar  
6 with the litigation order. But in addition, people had not  
7 come into the hearing necessarily or not come to the hearing  
8 at all, understanding that that's what would occur, and this  
9 just gives them an opportunity to opt out of the procedure.

10 So why don't you contact the parties. There  
11 aren't that many law firms involved, I looked at your  
12 list --

13 MR. CREMONA: Uh-huh.

14 THE COURT: -- and find out if there's anybody  
15 else who simply wants to forego the procedure with -- if  
16 they think their motion has been denied, or has been  
17 resolved by Judge Rakoff to withdraw their motion.

18 Now, I don't have a problem with them pursuing the  
19 motion and also going through mediation. It happens all the  
20 time. It's no extra work for you because you're going to  
21 file an omnibus reply. And if they want to spend the time,  
22 you know, filing a reply to your reply, I guess they can do  
23 that.

24 MR. CREMONA: The only response I would have, Your  
25 Honor, is we didn't think that it would be efficient or



1 appropriate to mediate the very same issues that are all, at  
2 this point, sub judice will be determined in the very near  
3 future.

4 The reason we had -- and I would also just point  
5 out, Your Honor, if I could, that the LPO provides that the  
6 parties can agree that mediation will not be productive.

7 THE COURT: They can usually agree to that.

8 MR. CREMONA: Yes.

9 THE COURT: And there's no mutual agreement here.  
10 And in addition, you know, these -- you say these issues are  
11 decided, in fact, there's an argument in the Second Circuit  
12 tomorrow, no one knows what's going to happen, my  
13 understanding is Judge Rakoff still has a couple of issues  
14 that he hasn't decided.

15 As I said the last time, this thing can't go on  
16 until the last issue is decided. And one of the things I  
17 was going to raise with you, my understanding is the trial  
18 at the end of the month has been settled?

19 MR. CREMONA: Yes, that's correct.

20 THE COURT: I wanted to find out if there are any  
21 other cases ready to go?

22 MR. CREMONA: Uh-huh.

23 THE COURT: In other words, any two year reach  
24 back cases where there were no motions to dismiss pending,  
25 because I want to start trying these cases.

1 MR. CREMONA: Understood, Your Honor, and we're  
2 looking into that.

3 THE COURT: All right. Yes?

4 MS. NEVILLE: Your Honor, this is Carol Neville.

5 THE COURT: Yes.

6 MS. NEVILLE: I'd like to raise one point. The  
7 procedures called for mediation before the motion to dismiss  
8 was fully briefed. And I know that there are a number of  
9 people who would consider mediation at some point when we've  
10 narrowed the issues.

11 So I'm hoping that what you just said would give  
12 us the opportunity to mediate at some point down the road  
13 when we've narrowed some of the issues.

14 THE COURT: Ms. Neville, you can always mutually  
15 agree --

16 MS. NEVILLE: Okay.

17 THE COURT: -- to mediate. I don't know how much  
18 narrower the issues are going to become. Obviously there  
19 are some undecided issues, but it's been pretty much  
20 narrowed by the Second Circuit and Judge Rakoff.

21 Let me ask you a question, in your reply -- so  
22 we've taken care of --

23 MS. DEARCY: Yes.

24 THE COURT: -- your issue. In your omnibus reply,  
25 are you going to identify which defendants made which

1 arguments?

2 MR. CREMONA: We have planned to do so, Your  
3 Honor.

4 THE COURT: Okay, fine. Also I want all of the  
5 defendants to deliver bindings that contain their pleadings,  
6 so we don't need the trustee's omnibus reply, we'll have one  
7 copy of that. And obviously to the extent that a law firm  
8 represents more than one defendant, and itself made an  
9 omnibus motion to dismiss like Ms. Chatman, for example, I  
10 only need one binder.

11 One other thing you had in your letter, you said  
12 you were going to add names or add cases to your list. No  
13 cases can be added or dropped without my approval, because I  
14 have to know which motions I'm deciding and which motions  
15 I'm not deciding. All right?

16 MR. CREMONA: Understood, Your Honor, and I guess  
17 that's what I wanted to address at this point. If there is  
18 going to be an opt out procedure, we would then have to  
19 modify our exhibit and there have been, I think when we  
20 originally submitted our letter, there were 144 cases on --

21 THE COURT: 146.

22 MR. CREMONA: -- I apologize, now there are 151  
23 because we -- and that's through yesterday afternoon. How -  
24 - but we can --

25 THE COURT: That assumes they want to participate

1 I guess.

2 MR. CREMONA: Uh-huh.

3 THE COURT: I mean, if they want to participate,  
4 that's fine with me.

5 MR. CREMONA: Uh-huh.

6 THE COURT: It sounds to me like it's going to be  
7 -- what I'll call the same post Rakoff arguments. If it's a  
8 fresh motion to dismiss.

9 MR. CREMONA: Well, we would take a different  
10 view. I think some of the --

11 THE COURT: I haven't looked at them.

12 MR. CREMONA: Yes. I mean, some of the -- the  
13 motion that was filed, in fact, yesterday raises antecedent  
14 debt, which we would take the position that it's been  
15 resolved, but.

16 THE COURT: All right. Well, that one won't take  
17 long.

18 MR. CREMONA: Uh-huh.

19 THE COURT: But -- all right. So why don't you  
20 survey the defendants, find out if any of the others want to  
21 opt out, it's -- as I say, it's not going to affect the work  
22 you're going to do, and assuming you're going to file your  
23 reply on time, you can just file something subsequently  
24 that's -- that informs me that these cases are not the  
25 subject in the motion to dismiss anymore.

1 MR. CREMONA: There were two housekeeping items  
2 I'd like to address with Your Honor. One, we had a meet and  
3 confer with the defense, with certain members of the defense  
4 group, and they had requested additional time to file their  
5 reply. And given the fact that there is now this potential  
6 --

7 THE COURT: So until the last person files a  
8 reply, this matter won't be ready, I guess?

9 MR. CREMONA: Well, I mean, given that now we're  
10 going to have an amended, possibly an amended exhibit, it  
11 would also be helpful to the trustee to have a short  
12 extension of time. It wasn't a long period. We had agreed  
13 with -- among the parties that our -- the trustee's and  
14 SIPC's opposition would be filed instead of March 10 on  
15 March 19, and the defendants would have until April 2nd to  
16 file their replies.

17 THE COURT: All of the defendants?

18 MR. CREMONA: Again, those that wish to  
19 participate, which we would have to crystalize between now  
20 and then, which is why I --

21 THE COURT: Why don't you file your reply on time,  
22 find out who doesn't want to participate. It gives you a  
23 week, because your reply I think is due the 10th, right?

24 MR. CREMONA: It is.

25 THE COURT: And you're ready to file it? You're

1 going to file the same reply, aren't you?

2 MR. CREMONA: Yes, that's true. The arguments are  
3 substantially the same so if people drop out --

4 THE COURT: All right. So then you can advise me  
5 between the 10th and the 17th when you can communicate with  
6 counsel, who's not participating in this motion to dismiss.  
7 I want to move this along.

8 MR. CREMONA: I agree, Your Honor. The only thing  
9 I would point out, I mean, there are some aberrational  
10 issues that if they -- if those parties dropped out, would  
11 influence the briefing.

12 THE COURT: Call them right now, you know.

13 MR. CREMONA: We will.

14 So -- just so I walk away with clarity, the  
15 schedule remains the same?

16 THE COURT: The schedule remains the same.

17 MR. CREMONA: Okay. For both the trustee and the  
18 defendant?

19 THE COURT: Yes.

20 MR. CREMONA: Okay.

21 THE COURT: All right. Anything else?

22 MR. MAY: May I?

23 THE COURT: Yes, sir.

24 MR. MAY: Your Honor, just briefly, Your Honor,  
25 Laurence May of Cole Schotz. Our firm represents the

1 defendants in Adversary 10-04405. That's the Fox adversary  
2 proceeding. It's one of them on the Appendix A to Mr.  
3 Sheehan's letter.

4 Your Honor, I had discussions with counsel, with  
5 Mr. Cremona, and I have a -- we have a little bit -- I think  
6 I understand what's happening to my client, but I'm not  
7 entirely sure. We have a little bit different  
8 circumstances. We have only in our case a six year look --  
9 claw back claim.

10 We made a motion in March of 2012 to have the  
11 reference withdrawn. That motion was granted. Our case has  
12 now been entirely dismissed. We have no pending motion  
13 before this Court, we have no pending motion anywhere. The  
14 only thing that possibly --

15 THE COURT: No transfers within two years?

16 MR. MAY: No. So I --

17 THE COURT: Unless the Second Circuit reverses it.

18 MR. MAY: Unless the Second Circuit reverses, but  
19 as things stand right now, my view is we shouldn't be on  
20 that list, we shouldn't be subject to the court order with  
21 respect to filing briefs, opt out or otherwise.

22 I submitted that we were put on that list in  
23 error, but -- and requested that we be withdrawn, and so far  
24 we're still on the list. As I understand circumstances, I  
25 don't believe this Court has any jurisdiction over my case

1 because --

2 THE COURT: So why don't you withdraw your motion  
3 to dismiss?

4 MR. MAY: I don't have a motion to dismiss.

5 THE COURT: Oh, then why are you on the list?

6 MR. MAY: I don't know.

7 THE COURT: Which number -- do you know which  
8 number you are on the list? I assumed that this list  
9 consisted of pending motions to dismiss.

10 MR. CREMONA: It does, Your Honor. As a technical  
11 matter, we included all motions, out of an abundance of  
12 caution and for completeness, so they're --

13 THE COURT: Well, out of an abundance of caution  
14 if the case is no longer pending, there's nothing to  
15 consider.

16 MR. CREMONA: Well, as I explained to Mr. May, I  
17 think the way that Judge Rakoff certified the appeal, the  
18 case is still pending, and the remaining -- the -- their --  
19 the claims are dismissed, but the case is pending. We  
20 included them in out of an abundance of caution in case they  
21 wanted to have an opportunity to be heard, in the event that  
22 we are successful on appeal, which we think we will be and  
23 the case is reinstated, I wanted them to have the  
24 opportunity, if they so chose, to participate.

25 THE COURT: So what are they supposed to do when



1 they get your omnibus reply?

2 MR. CREMONA: I --

3 MR. MAY: My comment, Your Honor, was that the  
4 Court will decide what it decides, it should not have any  
5 collateral estoppel effect. We recognize that it may have  
6 some precedential effect that's against us.

7 THE COURT: Is there an order dismissing your --

8 MR. MAY: Yes. Our case is on appeal to the  
9 Second Circuit, Your Honor.

10 THE COURT: Okay.

11 MR. MAY: There's nothing left of our case. Judge  
12 Rakoff's order dismissing the case, dismissed all the claims  
13 against our client. So our case is done from our  
14 perspective.

15 THE COURT: Are there any other cases in the same  
16 --

17 MR. CREMONA: There are seven cases in that  
18 posture.

19 THE COURT: Well, why don't you identify them? I  
20 don't see why they should have to participate in this  
21 procedure. Obviously if the Second Circuit or the Supreme  
22 Court reaches a different conclusion, it's going to change  
23 the case.

24 MR. CREMONA: Uh-huh. I'm happy to remove them,  
25 Your Honor.

1 THE COURT: I think that's a good idea, as well as  
2 the other six.

3 MR. CREMONA: Uh-huh.

4 MR. MAY: Thank you, Judge.

5 THE COURT: Make sure the parties know they've  
6 been removed. All right?

7 MR. CREMONA: Thank you.

8 THE COURT: So we've made progress today, we've  
9 removed 12 cases.

10 MS. SPIEGELMAN: Good afternoon, Your Honor, Sara  
11 Spiegelman of Wachtel Missry. My firm represents the  
12 defendants in adversary proceedings 52 through 61 on the  
13 schedule.

14 THE COURT: Uh-huh.

15 MS. SPIEGELMAN: We don't want to opt out of the  
16 procedure, but we just want to make sure that our issues are  
17 addressed on the omnibus reply, and we'd like an opportunity  
18 to submit an additional reply if the lead defendants don't  
19 address our issues in the way that we would like them to.

20 THE COURT: I don't understand. The trustee's  
21 going to file a reply to your motion.

22 MS. SPIEGELMAN: Right. And then --

23 THE COURT: And then you have the right to file a  
24 reply, right?

25 MS. SPIEGELMAN: Right. But according to the

1 order, it looks like it's one reply drafted by the lead  
2 defendant's counsel.

3 THE COURT: Yes. How many cases do you have?

4 MS. SPIEGELMAN: I have ten cases.

5 THE COURT: So file one reply, and if you have a  
6 particular argument for one of your cases or two of your  
7 cases, point it out in your reply, I don't need ten replies  
8 from you.

9 MS. SPIEGELMAN: Okay. My understanding from  
10 Baker Hostetler's letter was that all defendants shall  
11 coordinate with defense counsel copied on this letter and  
12 file one consolidated reply --

13 THE COURT: But there's an order which is  
14 different.

15 MS. SPIEGELMAN: Okay.

16 THE COURT: I didn't expect defense counsel to get  
17 together and file one reply. It'd be nice if he did, don't  
18 get me wrong, but I didn't expect that.

19 MS. SPIEGELMAN: Okay. Thank you, Your Honor.

20 THE COURT: All right. Anything else?

21 (No response)

22 THE COURT: All right. Thank you very, very much.

23 MR. CREMONA: Thank you, Your Honor.

24 (Proceedings concluded at 2:22 PM)

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**CERTIFICATION**

I, Sheila G. Orms, certify that the foregoing is a  
correct transcript from the official electronic sound  
recording of the proceedings in the above-entitled matter.

Date: March 6, 2014

**Sheila  
Orms**

Digitally signed by Sheila Orms  
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